

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ECHOLOGICS, LLC, MUELLER)
INTERNATIONAL, LLC, and)
MUELLER CANADA, LTD d/b/a)
ECHOLOGICS,)
Plaintiffs,)
v.) C.A. No. 19-2036-RGA
ORBIS INTELLIGENT SYSTEMS, INC.,)
and AQUAM USA, INC.,)
Defendants.)

J. Caleb Boggs Courthouse
844 North King Street
Wilmington, Delaware

Thursday, February 25, 2021
9:02 a.m.
Videoconference

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

MORRIS JAMES, LLP
BY: KENNETH L. DORSNEY, ESQUIRE

-and-

TAYLOR ENGLISH DUMA LLP
BY: COBY S. NIXON, ESQUIRE
BY: TODD E. JONES, ESQUIRE

-and-

MUELLER INTERNATIONAL, LLC
MUELLER CANADA, LTD
BY: CHASON CARROLL, ESQUIRE

For the Plaintiffs

1 APPEARANCES CONTINUED:

2 POTTER ANDERSON & CORROON LLP
3 BY: STEPHANIE O'BYRNE, ESQUIRE

4 -and-

5 KILPATRICK TOWNSEND & STOCKTON LLP
6 BY: A. JAMES ISBESTER, ESQUIRE

7 For the Defendants

8 *** PROCEEDINGS ***

9 THE COURT: Good morning. This is Judge
10 Andrews. Can you hear me?

11 MR. DORSNEY: Yes, Your Honor.

12 MS. O'BYRNE: Yes, Your Honor.

13 THE COURT: Okay. And I see my deputy clerk is
14 on the line. Can you hear me?

15 DEPUTY CLERK: Yes, Judge.

16 THE COURT: And I see my court reporter is on
17 the line. Can you hear me?

18 THE REPORTER: Yes, Judge.

19 THE COURT: All right. And I see Ms. O'Byrne
20 and Mr. Hitch, I believe.

21 In any event, Ms. O'Byrne, which side are you
22 on?

23 MS. O'BYRNE: Defendants, Your Honor.

24 THE COURT: And who's with you?

25 MS. O'BYRNE: James Isbester from Kilpatrick

1 Townsend.

2 THE COURT: Okay.

3 MR. ISBESTER: Good morning.

4 THE COURT: Okay. And Mr. Isbester, are you in
5 Atlanta, San Francisco, or someplace else?

6 MR. ISBESTER: I'm actually in the attic of my
7 garage in Berkeley, California. I'm in the San
8 Francisco area.

9 THE COURT: Okay. Sorry about the timing of
10 this.

11 MR. ISBESTER: Oh, not at all.

12 THE COURT: All right. And I'm sorry --

13 MR. DORSNEY: Your Honor, it's Ken Dorsney for
14 plaintiff. I dialed in.

15 THE COURT: Oh, okay. So good morning,
16 Mr. Dorsney.

17 MR. DORSNEY: Good morning.

18 THE COURT: And who have you got with you?

19 MR. DORSNEY: I have Chason Carroll from
20 Mueller's deputy general counsel along with co-counsel Todd
21 Jones and Coby Nixon from Taylor English.

22 THE COURT: All right. So I wanted to have this
23 conference so I could ask a few questions, but also partly
24 so I could see whether there was something I could do to
25 help resolve this amicably. And so I was thinking that

1 unless somebody wants to say something first, I would go
2 ahead and ask my questions.

3 Is there anything anybody wants to say before I
4 do that? I guess not.

5 MR. JONES: No, Your Honor.

6 THE COURT: Okay. So plaintiff, and I don't
7 know because there are two gentlemen on the screen, and they
8 don't have names which one is Mr. Jones.

9 Okay. Mr. Jones, are you the one going to be
10 speaking for your side?

11 MR. JONES: Actually, Mr. Nixon is. I may jump
12 in, if that's allowable.

13 THE COURT: Yeah, I have no problem with that.

14 So Mr. Nixon, okay. So does plaintiff have a
15 good faith belief right now that defendant's product
16 infringes?

17 MR. NIXON: So the product that Orbis has
18 represented that it is delivering to its customers with the
19 sticker, with an optional sticker covering the antenna,
20 Mueller's willing to dismiss with prejudice as to that
21 particular product and as to the two patents that are
22 asserted in this case.

23 THE COURT: Okay. So that seems like a slightly
24 different position than I saw in the papers that I looked
25 at. Am I missing something?

1 MR. NIXON: Really I think -- so the parties, as
2 we indicated in the briefing, discussed for several weeks,
3 negotiated a potential settlement or dismissal of the case.
4 And I think one of the sticking points was the scope of
5 products that would be -- the parties were negotiating it in
6 the context of a covenant not to sue going forward. And so
7 one of the key disputes or impasses was the scope of
8 products that would be subject to that covenant not to sue.

9 So Mueller, you know, is willing to, again, now
10 have this case dismissed with prejudice or have a covenant
11 not to sue that's limited to the particular product, the
12 current -- I'll just call it the current design with the
13 optional sticker.

14 THE COURT: So let me just interrupt a second
15 because my understanding is that by operation of law, if you
16 get a non-infringement finding as to a product, that may
17 have collateral consequences down the road for products that
18 are not indistinguishably different or some language like
19 that. But of course, until you have that product, it's hard
20 to tell.

21 Is my understanding of the law generally right?

22 MR. NIXON: I think so, Your Honor. Right.
23 This is an issue we haven't briefed or flushed out entirely,
24 but that is my understanding. I think the language is
25 essentially the same that the second product or the accused

1 product in a second lawsuit is essentially the same then
2 claim preclusion would --

3 THE COURT: Okay. So I'll come back to you, but
4 let me ask Mr. Isbester. Do you have another product that's
5 actually available right now or is the product that's
6 available right now the one that Mr. Nixon just said they
7 were willing to dismiss with prejudice against?

8 MR. ISBESTER: The only product we have
9 available right now is the one that Mr. Nixon indicated
10 willingness to dismiss with prejudice. And frankly, this
11 was worth teeing up for. That's all we want.

12 THE COURT: Have I solved the problem?

13 MR. ISBESTER: You have solved the problem, Your
14 Honor.

15 THE COURT: Mr. Nixon?

16 MR. NIXON: So I think if -- part of the
17 negotiations were what Mueller was willing -- if we're going
18 to agree to a dismissal with prejudice, Mueller prefers to
19 eliminate that ambiguity of essentially the same so that
20 we're not -- if there are modifications made to this product
21 down the road such that Mueller thinks, you know, now we've
22 got a different product here, you know, we wouldn't want to
23 be in a fight over whether the product is essentially the
24 same or not.

25 THE COURT: But you know, the problem with that,

1 Mr. Nixon, is you can't. You can't eliminate the ambiguity
2 because it depends on what they produce in the future;
3 right? I mean, theoretically, how would -- you know, and
4 maybe that between the two of you, you know, coming to a
5 negotiated agreement, you know, you could come up with
6 something that maybe helped in that regard. But in terms of
7 a disagreement, you know, if I granted the defendant's -- if
8 I let them file a motion for summary judgment, if I granted
9 it, you would be in exactly that position. It wouldn't help
10 you down the road; right?

11 MR. NIXON: I think if we, you know, agreed to a
12 dismissal with prejudice and had some language in there
13 stating that it's limited to this current product, that
14 would be, you know -- that would, you know, cabin the
15 preclusive effect going forward. That would be better
16 than -- and from Mueller's perspective, that would be better
17 than just either a summary judgment ruling or a dismissal
18 with prejudice full stop.

19 THE COURT: Yeah, but that's other than to
20 say -- you know, I had this come up in some case a few years
21 back, something very much like this or at least something
22 that, to my memory, was very much like this, and that's what
23 I concluded. The time which is -- you know, it's kind of
24 operation of law what would be precluded down the road. And
25 you know, if you're in a position where you're dismissing

1 with prejudice against this product, that does have some
2 ripple effect, but it's the exact same ripple effect that
3 would happen if you lost a summary judgment motion on this
4 product. And if, as it seems to be the case, you've
5 concluded that this product doesn't infringe, I think you're
6 trying to get something that is more than what you would get
7 if you just litigated and lost.

8 MR. JONES: Yeah, I believe you're correct, Your
9 Honor, but we would -- you know, if we're going down the
10 summary judgment route, then we would need a lot of --

11 THE COURT: Well --

12 MR. JONES: -- additional discovery. As we said
13 in our papers, you know, we've seen pictures of this product
14 with the sticker peeling off, our customers covering it.
15 You know, have they gotten certification for this model of
16 their product with the sticker? You know, there are a lot
17 of questions we have that if we were -- if we need to go
18 that route all the way to a summary judgment ruling, then
19 there's a lot we would want to do before we take -- before
20 we concede that we would lose on such a summary judgment.

21 THE COURT: Well, and I'm not -- I mean, you
22 know, part of the reason that I wanted to have this
23 conference is even if Mr. Isbester thinks the summary
24 judgment would be a slam dunk, it still takes me a lot of
25 time to get to that point. That's leaving aside you all

1 doing discovery and more contentions of one kind or another,
2 getting experts or whatever.

3 So you know, the way you're portraying it to me
4 right now, I'm thinking that what you ought to do is --
5 well, let me just ask one question.

6 So Mr. Isbester, if the plaintiff dismisses
7 against your current product with prejudice, is it
8 understood that you're not going to be asking for attorneys'
9 fees thereafter?

10 MR. ISBESTER: I think -- I have no express
11 direction from my client on that point, but Your Honor, that
12 if we could have this matter resolved today, my client would
13 be happy to see this in the rearview mirror and never
14 consider any other claims.

15 If it goes further, if it does go to summary
16 judgment, whether before or after extensive discovery, I
17 think that question becomes a very real concern because we
18 don't believe that this is a case in which the plaintiff has
19 a good faith basis to believe the product infringes and fees
20 would be appropriate. But if we could get it done today,
21 then I believe that will be the end of the case.

22 THE COURT: Well, okay. I mean, I guess part of
23 the reason I brought that up was just because it seemed to
24 be, I don't know, maybe implicit in what Mr. Nixon was
25 saying that or had started off by saying was that it would

1 end upon the filing of a motion to dismiss, and it's good to
2 make sure that we sort of all have the same understanding.

3 MR. ISBESTER: Your Honor, if I may respond to
4 what Mr. Nixon's (inaudible) --

5 THE COURT: Okay. So Mr. Isbester, for some
6 reason or another, your connection all of a sudden seems to
7 have gotten not so good.

8 MR. ISBESTER: Can you hear me now?

9 THE COURT: Yes.

10 MR. ISBESTER: Yes. Okay.

11 The concern seems to be and, you know, to go
12 back to your question just now, the original expectation, at
13 least on our side of the fence, was that once we had
14 provided this discovery, in other words, see that there was
15 no infringement, then the case would be resolved. That
16 would be it. And we weren't looking for fees, or costs, or
17 anything at that point, and it's still our hope that that's
18 the way we can proceed.

19 The effect of a dismissal without prejudice is
20 dilatory to the company for the reasons we've set forth in
21 the papers. The effect of a dismissal with prejudice is
22 that we would then be applying to any product yet unborn the
23 standard collateral estoppel and res judicata principles
24 that apply to a dismissal with prejudice. And we would be
25 taking on the risk that perhaps new design, if there were

1 such a thing, was sufficiently different from the old design
2 that we were exposed to claimed infringement.

3 And conversely, if we stayed within -- the
4 language I have heard is that the term substantially the
5 same for infringement analysis purposes -- if we stayed
6 within that yard, the scope of the dismissal with prejudice
7 would protect the company.

8 So I don't think there's a need for everybody
9 here today to start going through all the different possible
10 future designs that nobody has contemplated, nobody has
11 brought to market, and try and figure out how to draft
12 language that would limit the scope of a dismissal with
13 prejudice to cover that future design possibility. I think
14 the law provides exactly the cabining that Mr. Nixon is
15 looking for.

16 THE COURT: You know, my opinion, and perhaps I
17 haven't thought about this enough to even really have an
18 opinion, but my opinion is, and there's always going to be
19 some gray area, and that's something that as in business,
20 the business side of what your two companies do, you have to
21 work around that or you have to contemplate that and take
22 your best shot at it, and whatever happens, happens.

23 So I guess what I'd like to know, and it kind of
24 goes back to what Mr. Nixon said at the beginning, is it
25 seems to me, based on listening to what you're saying,

1 everybody's saying, and not considering the actual
2 underlying merits of whether or not Orbis' product infringes
3 or defendant's product infringes because, frankly, I get
4 your two names mixed up. That's what I'm kind of trying to
5 avoid having to do, so I don't really have an opinion about
6 that. I'm just kind of reading off of the way you all are
7 talking.

8 So what I think is that plaintiff, that you
9 ought to have an understanding, which you can confirm
10 without me being present, that the plaintiff will dismiss
11 the suit against whatever the identified accused product is
12 with prejudice. And defendant is not going to seek any
13 attorneys' fees, costs.

14 I mean, in other words, this is essentially a
15 settlement. But one of the aspects of the settlement is
16 that, kind of like Mr. Isbester said, is that there's going
17 to be some zone of protection, which is whatever the
18 protection is that comes by law to the defendant's future
19 attempts in this market.

20 So in any event, I think that's agreeable with
21 Mr. Isbester. Is that agreeable with you, Mr. Nixon?

22 MR. NIXON: Just a couple points there, and
23 again, you know, we haven't briefed or gotten into the claim
24 preclusion issues here, but there is a recent decision from
25 the Federal Circuit where it says that settling parties

1 remain free to limit the preclusive effect of a dismissal.
2 There was an argument over the scope of preclusive effect
3 and basically the Federal Circuit kind of faulted one party
4 saying, you know, you voluntarily dismissed. You could
5 have, you know, cabined that preclusive effect in that
6 dismissal, but you didn't. And so that's -- Mueller's
7 approach here is we -- you know, if we're agreeing to a
8 dismissal with prejudice, we would want it to be limited to
9 the two asserted patents at issue in the case and then
10 limited to the current product.

11 And you know, in terms of who bears the
12 uncertainty going forward, you know, just step back and note
13 that this lawsuit was filed on a product that appeared to --
14 on the original design of a product that, you know, looks
15 like it would have infringed these patents. If Mueller
16 feels justified in protecting its intellectual property to
17 this lawsuit, Orbis has redesigned the product. After much,
18 you know, discussion, Mueller is willing to agree to this
19 dismissal.

20 I think going forward there is this concern that
21 the product will be modified either by Orbis or by
22 customers, and we think that, you know, Orbis should bear --
23 if they make design changes that have nothing to do with
24 these patents, then obviously there's no concern. But if
25 there are modifications to further protect the antenna on

1 the product, you know, we think that product should be fair
2 game and not subject to an argument over is this essentially
3 the same or not.

4 THE COURT: All right. Well, so I think it's
5 certainly reasonable to say that the lawsuit dismissal is
6 limited to the two patents you have asserted; right?

7 Do you agree with that, Mr. Isbester?

8 MR. ISBESTER: Absolutely.

9 THE COURT: But you know, but I don't understand
10 Mr. Nixon, perhaps it's just lack of imagination on my part,
11 how exactly you would -- would you be proposing to change
12 the law's effect on dismissal with prejudice?

13 I mean, in other words, there's law out there.
14 You know, we've all kind of talked about it without knowing
15 precisely exactly what it is or just maybe speaking for
16 myself. You know, I'm not wild about this idea, but I do
17 want to understand what it is you're saying.

18 How would you say what you're saying? You know,
19 if they -- just tell me.

20 MR. NIXON: Sure. And again, I think this is --
21 I think it would be acceptable and proper, you know, right,
22 the operation of law is one thing if it was just a dismissal
23 with prejudice full stop. But if there is language in the
24 dismissal, you know, limiting it to these two patents and
25 limiting it to the product shown in Exhibit B, right, you

1 know, or Exhibit A that we attach, and this is what we were
2 attempting to do in our settlement agreement, last
3 settlement agreement that the parties negotiated was show
4 the product, you know, identify the product as best we can
5 in that filing or in that pleading and say that's the
6 product that with prejudice applies to.

7 THE COURT: But I guess what I'm wondering is,
8 and I think, again, I'm guessing Mr. Isbester doesn't object
9 to your saying it's this product. But the thing is saying
10 it's this product, unless you're then adding the language,
11 and it's exactly this product, and if you change one comma
12 in it, it doesn't count. Then by saying it's this product,
13 you're in the operation of law that if they do some, you
14 know, substantially the same down the road or not
15 insubstantially different, whatever the standard is, that's
16 going to be covered by your dismissal. Right?

17 So I guess what I'm wondering is saying, you
18 know, we'd like to attach a photo and identify the product
19 specifically, that seems to be not inconsistent with what
20 Mr. Isbester wants. But unless you're saying and the normal
21 Federal Circuit law doesn't apply, there's still going to be
22 some zone down the road that, you know, Orbis can change
23 things and it may -- and if there was a lawsuit, it may be
24 that whatever changes that were made would be, you know, not
25 insubstantially different or whatever the standard is.

1 Right?

2 MR. NIXON: I mean, I will say the other thing
3 that we were doing in connection with our settlement
4 agreement, Mueller put in for the ordinance of doubt was
5 describing modifications that shall be deemed a different
6 product basically relating to -- so I think there are some
7 examples that could go in to give some certainty on
8 particular things that we can think of right now.

9 THE COURT: All right. Mr. Isbester, these
10 modifications, or modifications is not the right word.
11 These things Mr. Nixon is talking about in the proposed
12 settlement agreement where they were saying, as I understand
13 it, if you do "X", that makes that or, you know, I don't
14 exactly know what Mr. Nixon -- obviously, I don't know what
15 was exactly in the settlement agreement. But assuming it
16 said if you do "X", that's not substantially the same,
17 what's your take on that?

18 MR. ISBESTER: So I think the concern is
19 two-fold. First of all, let me say as a predicate, it's a
20 little unusual for us to be discussing what the parties have
21 proposed to each other by way of settlement. I will try to
22 speak a little bit to the hypothetical situation.

23 We would not want a resolution of this case that
24 in any way precludes future owners of either Orbis or the
25 business that Orbis is building around the SmartCap from

1 deriving the benefit of that dismissal with prejudice. In
2 the same way that if there were a summary judgment or a jury
3 verdict upheld, and that type judgment, somebody who later
4 acquired the SmartCap product, either by acquiring just the
5 business or acquiring the entire company, would gain some
6 protection by virtue of that earlier decision. And I think
7 that has been spelled out in the law, and we don't need to
8 try and renegotiate, recreate that scope of the impact of
9 whatever resolution we arrive at here. That's already a
10 legal principle that's well established and clear.

11 Whenever we start speaking about modifications,
12 we then immediately get into, okay, what is the exact nature
13 of the modification? For example, we know that the sticker
14 is -- I think it's like nine-one-thousands of an inch thick.
15 Is eleven-one-thousands of an inch thick? I don't know.

16 I don't know where all those modifications might
17 go, and so I worry that in trying to identify modifications
18 in advance, we are creating problems that really can't be
19 solved until we actually know of a modification that the
20 company wants to implement and would have some effect on the
21 patent analysis. And that is why we've simply been saying
22 the law is -- there's sufficient protectant on that.

23 Now, if there were -- if it was dismissed with
24 prejudice, we're limited to just these two patents which I
25 think is absolutely appropriate and just the existing

1 SmartCap product which would be the product that we would
2 present to the Court for a motion for summary judgment. And
3 if there is some specific modifications that plaintiff has
4 in mind that either is within or constitutes the line in the
5 sand beyond which a new infringement count can be brought
6 then, you know, I think we could work with that. But beyond
7 that, I'm not -- I'm worried that anything we come up with
8 is going to be an incomplete solution and it's just going to
9 be -- simply change the nature of the debate from whether or
10 not there is infringement to whether or not the product
11 complies with the modification language that is provided in
12 whatever dismissal is entered.

13 THE COURT: All right. Thank you, Mr. Isbester.

14 So let me just say one thing because
15 Mr. Isbester brought something up that I'm at least somewhat
16 conscious of which is if either side thinks some time after
17 today that I've involved myself too much in talking about
18 your positions or essentially trying to settle this case,
19 you know, just write me a letter, and I'll get it reassigned
20 to a different judge if you're going to go forward and
21 litigate. You know, I don't want to -- you know, I
22 recognize what Mr. Isbester said is a legitimate concern.

23 So that being said, here's what I think you
24 ought to do. I think you're very close. And maybe this is
25 where you were before you started writing briefs and letters

1 asking for summary judgment, but it seems to me that the
2 plan ought to be, and I don't think it's going to be
3 resolved today probably, but the plan ought to be, you know,
4 plaintiff dismisses with prejudice as to these two patents
5 against this product. And you ought to spend, you know, a
6 day, or two, or whatever you need debating or talking to
7 each other about whether or not there is some what I think
8 Mr. Isbester called line in the sand.

9 If there's something you can do that's mutually
10 agreeable to identify what that line in the sand is, okay,
11 well, that would seem like a good thing. You know, whether
12 or not it can be done, I have no idea, and that would be way
13 beyond any useful contribution I could make, I think. And
14 you know, based on what you're both saying, it seems to me
15 that it's in your interest, both sides' interest to resolve
16 this case now. But I think the final step needs to be taken
17 by you all.

18 And I guess I should say, Mr. Nixon, do you have
19 anything further to add after what Mr. Isbester just said?

20 MR. NIXON: I do want to give Mr. Carroll,
21 Mueller's representative deputy general counsel an
22 opportunity. I think he wanted to make a comment.

23 Is that right?

24 MR. CARROLL: Yes, Coby. Your Honor, if you
25 would allow me to make some quick comments?

1 THE COURT: Sure. Go ahead.

2 MR. CARROLL: First, Your Honor --

3 THE COURT: Actually, just hold on a second,
4 because I lost track. What is your name, sir?

5 MR. CARROLL: First name is Chason, C-H-A-S-O-N.
6 Last name Carroll, C-A-R-R-O-L-L.

7 THE COURT: Okay. And let me just ask:
8 Mr. Isbester, you don't object to me letting Mr. Carroll
9 speak, do you?

10 MR. ISBESTER: No, not at all, Your Honor.

11 THE COURT: All right. Go ahead, Mr. Carroll.

12 MR. CARROLL: Thank you. And first of all, let
13 me say, Your Honor, thank you for participating in this
14 hearing because, you know, we litigate a lot, and I think a
15 lot of cases can be settled without all this hoopla.

16 But I think this case, and the reason Mr. Nixon
17 and Mr. Jones are putting these arguments forward is because
18 we feel like this case is about this product, not about this
19 product modified. And we think the onus, and the
20 uncertainty, and the fit of any changes and modifications
21 should be on the defendant, not us, right. And if we get
22 into a settlement agreement where we have substantially
23 similar language or other things of that nature, it puts us
24 in a contract, breach of contract context, not an
25 infringement context. It's a different body of law, and

1 it's a different damages analysis. It's a completely
2 different issue.

3 So that's why Mueller is a little hesitant to
4 enter into a settlement agreement with the defendants
5 because we've seen the product. They've made the product
6 that infringes, without a doubt. And we know that they have
7 customers they've talked to about it because we've talked to
8 the same customers, our customers.

9 So we see things in the future causing us to
10 have to come back to the court if they make modifications.
11 And look, this is business. You know, we have all the
12 attorneys on the phone because you guys live in the legal
13 world. We live in the business world. And it's all
14 practicality. Right.

15 If they change the thickness of the sticker,
16 first of all, we're not going to know. We're not going to
17 care. But it's -- we know the product they make today, Your
18 Honor, doesn't work. It's not going to work. And they know
19 that it's not going to work. And we see in the future
20 they're going to make a modification which is going to cause
21 an issue and cause us all to come back to court.

22 So if we look at this product, we're happy to
23 say you're right, the way you make the product today, we're
24 happy to dismiss this case. But as Mr. Nixon said earlier,
25 without us having discovery to see actually what they're

1 doing behind the scenes, what they're planning to do next
2 year, it's hard for us to say that you're not infringing
3 today. I mean, they could be infringing today, we just
4 haven't seen it because they haven't provided us any
5 discovery for us to look at.

6 So you know, again, I think the biggest issue we
7 have is we're happy to dismiss this case with these patents
8 on that product. And I understand, Your Honor, you know,
9 the law, if we go through summary judgment and through
10 trial, the law around infringement analysis is slightly
11 different than the analysis around breach of contract. And
12 that's our concern.

13 So if the defendants are willing to say, hey,
14 this product, let's dismiss this case right now, I'm willing
15 to say right now, we'll go ahead and do that right now. We
16 don't have to negotiate for two days, three days. If they
17 want to say that product as is, I can represent Mueller
18 saying we will go ahead and sign that right now.

19 But if they want leeway, if they want to change
20 things, if they want modifications and to throw us back into
21 litigation over a breach of contract, that is something that
22 our management just wants to avoid, honestly. That's why
23 we're trying to get this settled.

24 THE COURT: I have to say Mr. Carroll --
25 Mr. Carroll, can you mute yourself?

1 MR. CARROLL: Your Honor, you broke up.

2 THE COURT: There's now my echo, and I'm
3 thinking that's because you unmuted.

4 MR. CARROLL: Oh, unmute.

5 THE COURT: And I'm thinking if you mute, there
6 won't be this echo. So I have to say, Mr. Carroll, it
7 doesn't sound like you and Mr. Nixon are on the same page
8 because I think he's just been asking for what you've just
9 said you don't actually want. And it seems to me that
10 you're more on the same page as Mr. Isbester. Because I'm
11 taking it you don't want to have stuff in a dismissal, you
12 want, or what I think I heard you say, Mr. Carroll, and I
13 apologize if I got it wrong, was you're happy to dismiss
14 against this product on these two patents with prejudice
15 today, end of story. Am I right?

16 MR. CARROLL: Yes, sir, that is correct, but the
17 issue we have is defendant would like to say they can make
18 modifications that are substantially similar to the product
19 today which that gets us back into the we're going to be
20 back in court next week when they make a modification.

21 THE COURT: But the way that you have proposed
22 it, they can make modifications next week. And the
23 modifications that they make, you know, then there's a
24 judgment call. First, there's a judgment call on their part
25 about the modifications they make. And then there's a

1 judgment call on your part about whether those modifications
2 now infringe these two patents or some other patents you
3 have. Right?

4 MR. CARROLL: Yes, Your Honor, but at that point
5 we're in a breach of contract context, not an infringement
6 context, which is a completely different analysis from a
7 damages standpoint. And you're right, they have to make the
8 judgment. We have to make the judgment. And you know,
9 business people seem to be reasonable. And the reason we
10 filed this case is they offered for sale products that
11 infringe. That's what started this entire thing.

12 Now, they've recently backed off of that, but
13 nothing stops them from making modifications in the future
14 to create that problem again. So -- and I guess, Your
15 Honor, what I'm trying to say is if we want to get this off
16 your docket, if we want to close this case out, it's very
17 easy. It's very easy for us to say these two patents, your
18 product, and that's it.

19 And if there's modifications in the future,
20 whether we go through summary judgment, whether we go
21 through settlement, you have the same analysis. The only
22 difference is we can close this out today by agreeing to
23 these terms and be done versus, okay, we can negotiate for
24 days or weeks to get a settlement agreement that is going to
25 have the same ambiguity as we're going to have with the

1 claim preclusion in a year if they make changes in a year
2 after summary judgment.

3 So I guess what I'm trying to say is by agreeing
4 to the settlement agreement today saves everybody time and
5 money and puts us in no worse situation than a year or two,
6 four, six after litigation.

7 THE COURT: All right. So let me turn it back
8 over to Mr. Nixon. Do you have any comment?

9 MR. NIXON: Yes, Your Honor. I'll try to maybe
10 clarify where Mr. Carroll and I are on the same page. And
11 when Mr. Carroll says, you know, that Mueller is willing to
12 dismiss with prejudice as to these two patents and this
13 product, I think the proposal is a dismissal, not a
14 settlement agreement, but a dismissal that has the language
15 of which with prejudice, but is expressly limited to these
16 two patents and this product such that it cabins the
17 preclusive effect that would otherwise happen as a matter of
18 law.

19 I think, you know, when Mr. Carroll says we
20 don't want them to have -- we don't want Orbis to be allowed
21 to modify going forward, and they should bear the burden if
22 they modify, whether that's a problem or not, I think what
23 Mr. Carroll is suggesting is rather than having a with
24 prejudice dismissal operate as a matter of law, that
25 preclusive effect, that we would cabin that in this

1 dismissal as I proposed earlier, have a restricted dismissal
2 limited to this particular product.

3 THE COURT: But in other words, are you saying
4 that your proposal is to dismiss with respect to this
5 product exactly as it is today and, you know, if there's one
6 comma that's changed, it doesn't apply?

7 MR. NIXON: Yeah. I think, as Mr. Carroll
8 articulated, if there are changes that -- the burden should
9 be on Orbis to identify what changes it has in mind going
10 forward. You know, we're concerned with this product that
11 they have released right now. And we're fine to dismiss as
12 to that particular product.

13 THE COURT: But the thing is when you say what
14 changes they have in mind going forward, I assume it's kind
15 of a rolling process. Presumably, they have engineers or
16 the like who have ideas from time to time. And so they may
17 have some ideas now in mind now. They may have some ideas
18 that occur to them tomorrow which is presumably --

19 MR. NIXON: So we understand that. So, you
20 know, a year from now, they may come up with a design change
21 and that change may have nothing to do with the patent. It
22 wouldn't cause -- now, it may make it so that new -- that
23 that modified product is now outside of the effect of this
24 dismissal, but if it's a change that doesn't relate to the
25 patents then, you know, there's -- Mueller wouldn't care.

1 There's no harm here.

2 But that burden should be or that certainty, we
3 think Orbis should bear that. So if they come up with
4 design changes later, it may, you know, take it outside of
5 the effect of this dismissal, but that's, you know --

6 THE COURT: But I guess in a way, I guess the
7 other thing I'm wondering about is when you say they should
8 have the burden, so to speak, I take it in the normal kind
9 of thing where there's a follow-on product, you have to
10 prove -- the plaintiff would have to prove that it's not
11 substantially similar or whatever the language is? That
12 they have to prove it is substantially similar, is that what
13 you mean?

14 MR. NIXON: Well, so if we had a dismissal with
15 prejudice full stop, six months from now there's a design
16 change on the product, Mueller accuses it of infringement.
17 Now, not only, you know, Mueller obviously has the burden to
18 prove infringement, but now there's an issue: Is it covered
19 under the prior dismissal or not? Is it essentially the
20 same? And we -- if Mueller is agreeing to a dismissal right
21 now, we would want to take that dispute off the table. If
22 there's a design change, it's outside of the scope of
23 dismissal, and so now, you know, Mueller obviously still has
24 the burden of proof that it infringes, but there's no
25 argument over whether claim preclusion applies or not.

1 MR. ISBESTER: Your Honor, may I offer one
2 observation here?

3 THE COURT: Sure. Go ahead.

4 MR. ISBESTER: I think we are arguing about
5 issues that lawyers have presented to judges in the past and
6 it's pretty well cleared up. Where there is a dismissal
7 with prejudice in the future product that is somehow
8 modified, plaintiff goes for infringement. Defendants offer
9 that as an affirmative defense, the defense of collateral
10 estoppel or res judicata.

11 It is then the defendant's burden to demonstrate
12 that the new modified product is within the umbrella of the
13 protection of the previous dismissal. I don't think we need
14 a contract to do that.

15 THE COURT: Well, and I -- right. So you know,
16 I'm way beyond what I actually know here.

17 Do you, Mr. Nixon, agree with what Mr. Isbester
18 just said is kind of an analytical framework if there was a
19 subsequent suit down the road?

20 MR. NIXON: I think that's probably right that
21 it would be defendant's burden to show -- to be a defense
22 on -- you know, the claim preclusion applies. And I think
23 our proposal, you know, it would take that claim preclusion
24 defense off the table. It would -- you know, we're not
25 arguing over whether it's essentially the same or not

1 because the -- because this dismissal is limited to the
2 product itself and does not encompass essentially the same
3 changes.

4 THE COURT: All right.

5 MR. NIXON: So basically it would eliminate that
6 defense. That defense would not be available, that's sort
7 of our...

8 THE COURT: All right.

9 MR. NIXON: And I guess, you know, if we're -- I
10 mean, more discussion between the parties probably would be
11 helpful on this because, you know, an alternative to a
12 dismissal with this language would be a settlement agreement
13 with some sort of -- in the context of a covenant not to sue
14 as we were pursuing. Maybe we can make some more progress
15 there. There probably are a couple different ways we can
16 come at it.

17 MR. DORSNEY: Your Honor, it's Ken Dorsney. If
18 I could chime in just for a minute. It may make sense to
19 spend some time working with the magistrate assigned, I'm
20 not sure if it's Judge Thyng or Judge Burke, to see if we
21 could not hammer out a term sheet to get this case
22 dismissed.

23 THE COURT: And I don't know who -- I don't know
24 which magistrate judge -- actually, I think it might be -- I
25 don't know. You know --

1 MR. DORSNEY: Maybe Hall.

2 THE COURT: -- it doesn't matter. I mean, it
3 doesn't really matter. I do remember because I was skimming
4 through the docket earlier today, and I do remember
5 seeing -- I thought it was assigned to some magistrate judge
6 other than Judge Thyng, but it didn't register any further
7 than that with me.

8 Well, look, you know, in a way, I feel, you
9 know, I at least better understand why you haven't so far
10 resolved this case. I think it would make sense, both based
11 on what Mr. Dorsney said and what the other counsel have
12 said, to basically give you a further chance to speak to
13 each other and to try to resolve this, whether it's by the
14 dismissal without a settlement agreement, but with at least
15 the understanding that, you know, there's no question about
16 attorneys' fees. In other words, completely resolve it.
17 And maybe you can't do that without it being called an
18 agreement, I don't know.

19 And you know, it makes sense to me, as
20 Mr. Carroll has said, that this case ought to be resolved
21 because it seems like the essence of your dispute is really
22 about something that doesn't exist right now. And so to
23 some extent, it seems to me that resolving the dispute
24 that's before -- that exists now shouldn't be driven by
25 resolving a dispute that doesn't exist. But --

1 MR. DORSNEY: Your Honor.

2 THE COURT: Yes, Mr. Dorsney.

3 MR. DORSNEY: This is Mr. Dorsney again. If I
4 may, in the context of what you just said, the dispute that
5 exists now is confined by the scope of what we were able to
6 investigate in the course of the discovery, the limited
7 discovery that was allowed in the case. So I think that
8 that's the roadblock to some of this is that we'd like the
9 dismissal with prejudice to be confined to the actual scope
10 of the case that we were able to investigate.

11 THE COURT: Yeah. So what does that mean,
12 Mr. Dorsney?

13 MR. DORSNEY: As we sit here right now, I think
14 maybe we could try to work out a term sheet or some type of
15 resolution that embodies that scope. If we could do that
16 then maybe we could have the case dismissed with prejudice,
17 and it would be associated with those sort of settlement
18 terms, that settlement agreement.

19 THE COURT: Okay. Well, the only thing I
20 really -- so I don't really have anything more that's
21 possibly useful, assuming anything that I've said at all has
22 been useful. But what I do think would be good is for you
23 to talk to each other about how you'd like to proceed
24 prioritizing resolving the case, whether it's by settlement
25 agreement, or by dismissal, or whatever it is. It seems to

1 be a poor vehicle for litigating your disputes.

2 And perhaps the only other thing I'd say, and
3 this is based on something that Mr. Dorsney just said
4 perhaps, if this is true, and I don't know whether it is or
5 not, but if defendant were in a position to represent that
6 at the current time it has no plans to change the accused
7 products. And you know, you'd obviously have to wordsmith
8 that to say whatever actually was true, that might -- maybe
9 that would help. It seems to be, and I'm not saying
10 Mr. Isbester actually said this, but it seemed to be kind of
11 implicit that they're working on -- the defendant is selling
12 the product that's accused right now, but I don't know.

13 So can I just ask that, say, in a week or so,
14 assuming you haven't resolved it in the mean time, just send
15 me a status report or, you know, something. And you know,
16 if the status is you want a new judge, let me know. If the
17 status is, yeah, we're working on it, need another "X"
18 amount of time, that's fine. And if the status is, no, we
19 can't possibly resolve this. We want to go to litigation,
20 but we're happy to have you stay as the judge, you know,
21 just let me know what's happening.

22 Okay? Is there anything else anybody wants to
23 say before I wish you all a good day?

24 MR. NIXON: Thank you very much, Your Honor.

25 MR. ISBESTER: Thank you for your time, Your

1 Honor.

2 THE COURT: All right. Well, listen, let me
3 know what's happening in a week, if I haven't found out
4 somehow before then. And I wish you all luck.

5 All right. I'm going to hang up.

6 (Everybody said, Thank you, Your Honor.)

7 (Videoconference was concluded at 9:58 a.m.)

8 I hereby certify the foregoing is a true and
9 accurate transcript from my stenographic notes in the
10 proceeding.

11 /s/ Heather M. Triozzi
12 Official Merit and Real-Time Reporter
13 U.S. District Court
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